

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

74-2352

To be argued by
ROBERT M. ZISKIN

In The

United States Court of Appeals

For The Second Circuit

WOMEN IN CITY GOVERNMENT UNITED, BARBARA ROBERTSON, LESLIE BOYARSKY, JACQUELIN GROSS, IRLENE FRIEDMAN, ROBERT SUSSMAN, ALICIA CANTELMI, PAMELA MILLS, SUSAN PASS, LINDA ZISES, EMILY BLITZ, SUSAN PADWEE, ELAINE JUSTIC, EULA CARTER, and LINDA SHAH, on behalf of themselves and others similarly situated,

Plaintiffs-Appellants.

vs.

THE CITY OF NEW YORK; ABRAHAM BEAME as MAYOR OF THE CITY OF NEW YORK; JOHN V. LINDSAY; HARRY BRONSTEIN, as CITY PERSONNEL DIRECTOR; NEW YORK CITY HEALTH AND HOSPITALS CORPORATION; NEW YORK CITY HOUSING AUTHORITY; NEW YORK CITY OFF-TRACK BETTING CORPORATION; JOSEPH MONSERRAT, SEYMOUR P. LACHMAN, ISAIAH E. ROBINSON, JR., MARY E. MEADE, Constituting the BOARD OF EDUCATION OF THE CITY OF NEW YORK; BLUE CROSS & BLUE SHIELD OF GREATER NEW YORK; GROUP HEALTH INCORPORATED; SOCIAL SERVICES EMPLOYEES UNION; SOCIAL SERVICES EMPLOYEES UNION WELFARE FUND; DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES; DISTRICT COUNCIL 37 HEALTH & SECURITY PLAN; UNITED FEDERATION OF TEACHERS; and UNITED FEDERATION OF TEACHERS WELFARE FUND.

Defendants-Appellees.

On Remand from the Supreme Court of the United States.

**BRIEF FOR DEFENDANTS-APPELLEES UNITED
FEDERATION OF TEACHERS AND UNITED
FEDERATION OF TEACHERS WELFARE FUND**

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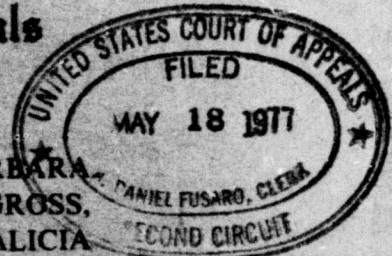


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THE CITY OF NEW YORK; ABRAHAM BEAME as MAYOR OF THE CITY OF NEW YORK; JOHN V. LINDSAY; HARRY BRONSTEIN, as CITY PERSONNEL DIRECTOR; NEW YORK CITY HEALTH AND HOSPITALS CORPORATION; NEW YORK CITY HOUSING AUTHORITY; NEW YORK CITY OFF-TRACK BETTING CORPORATION; JOSEPH MONSERRAT, SEYMOUR P. LACHMAN, ISAIAH E. ROBINSON, JR., MARY E. MEADE, Constituting the BOARD OF EDUCATION OF THE CITY OF NEW YORK; BLUE CROSS & BLUE SHIELD OF GREATER NEW YORK; GROUP HEALTH INCORPORATED; SOCIAL SERVICES EMPLOYEES UNION; SOCIAL SERVICES EMPLOYEES UNION WELFARE FUND; DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES; DISTRICT COUNCIL 37 HEALTH & SECURITY PLAN; UNITED FEDERATION OF TEACHERS; and UNITED FEDERATION OF TEACHERS WELFARE FUND,

Defendants-Appellees.

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BRIEF FOR APPELLEES
UNITED FEDERATION OF TEACHERS AND UNITED
FEDERATION OF TEACHERS WELFARE FUND

PRELIMINARY STATEMENT

This case is before the Court upon
the United States Supreme Court's remand of said

action to this Court for further consideration
in light of General Electric Co. v. Gilbert,
429 U.S. ___, 97 S. Ct. 401 (1976). This brief
is submitted in connection with the instant
remand.

COUNTER STATEMENT OF THE
ISSUES PRESENTED

1. Does the Complaint state a cause of action?
2. Is the exclusion of pregnancy and related conditions from fringe benefit plan coverage proscribed discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, *et seq.* ("Title VII")?
3. Is it proscribed discrimination to provide a benefit or fail to provide a benefit to individuals who, because of physiology would be the only ones affected thereby?
4. What does invidious discrimination mean in context of Title VII as it relates to pregnancy and related conditions?
5. Does discrimination on grounds of sex (or gender) mean something different when the Fourteenth Amendment is involved than when Title VII comes into play?
6. Under Rule 8(a) of the Federal Rules of Civil Procedure, ("FRCP") must a plaintiff in a sex discrimination case based upon pregnancy plead that the acts complained of were intentional and purposeful deprivation of specific rights and if so, is the failure to so plead a fatal defect to the complaint?

7. Under Rule 8(a) of the FRCP, must a plaintiff in a Title VII action plead that she has filed charges against the defendants with the Equal Employment Opportunity Commission ("EEOC") and specifically allege the names of the defendants against whom such charges were filed?

8. Under Rule 8(a) of the FRCP, must a plaintiff in a Title VII action plead exhaustion of her remedies?

9. Under Rule 8(a)(1) of the FRCP must a plaintiff in a Title VII action plead the grounds upon which the court's jurisdiction depends by alleging the issuance of "right to sue" letters prior to the institution of said action?

10. Under Rule 8(a) of the FRCP must a plaintiff allege demand for payment of disability benefits prior to institution of action under Title VII?

11. Under Rule 8(a) of the FRCP was the plaintiff WICGU required to plead that it had a cause of action in its own right under Title VII naming members as representative parties as required by Rule 23.2 of the FRCP?

12. Under Rule 8(a) of the FRCP must a plaintiff, seeking redress under Title VII, who wishes to maintain a class action, plead the facts of numerosity, commonality, representivity and typicality as prerequisites to there being jurisdiction?

13. Does the institution of an action under Title VII, prior to the issuance of "right to sue" letters render such action jurisdictionally defective?

14. Is a Welfare Fund which is not an employer, labor organization or employment agency a proper party defendant within the meaning of Title VII?

15. Does the plaintiff WICGU have capacity to sue and if it is not a protected person under Title VII, may it nevertheless be representative of a class of litigants of which it is not a member?

16. Is the failure to make a timely motion under 11A(c) of the Rules of the District Court for a class determination under Rule 23(c)(1) of the FRCP, a defect precluding the maintenance of an action and the prosecuting of the instant appeal?

COUNTERSTATEMENT OF THE CASE

The Appellants commenced this action on January 17, 1974 against sixteen appellees including therein one city, two mayors, one city personnel director, two municipal corporations, one municipal authority, one board of education, two insurance carriers, three labor organizations representing public employees and three welfare funds affiliated with the three named labor organizations.

The complaint herein filed by WICGU and fourteen employees alleges that the previously described appellees have violated Title VII, the Fourteenth Amendment to the United States Constitution and various provisions of State Law by providing fringe benefits which are less favorable to women than to men. Appellants allege in their first cause of action that the employers have discriminated against employees on the basis of sex in that health and hospitalization insurance plans provided by the employers offer substantially fewer benefits for pregnancy and pregnancy related conditions than for other medical and surgical problems requiring hospital and medical care (App. at 27a-33a). * In the second cause of action, two

* References to the Joint Appendix for this appeal will be cited as "App. at ."

insurance carriers are joined with the City and its related agencies as having aided and abetted the City in allegedly providing discriminatory health and hospitalization insurance (App. at 34a). In the third cause of action, the United Federation of Teachers (UFT), the Social Service Employees Union (SSEU) and District Council 37, American Federation of State, County and Municipal Employees (AFSCME) are joined as having allegedly negotiated discriminatory health and hospitalization fringe benefits with the defendant City (App. at 35a). In its fourth cause of action, it is alleged that the City, UFT and United Federation of Teachers Welfare fund (UFT Welfare Fund) have established and administered programs which are discriminatory with respect to providing benefits for pregnancy and pregnancy related conditions (App. at 36a-37a). Causes of action fifth and sixth allege the establishment and administration by the SSEU and AFSCME respectively of welfare fund programs which are discriminatory with respect to providing benefits for pregnancy and pregnancy related conditions (App. at 37a-39a). Finally, in causes of action seven through eleven, appellants challenge the policies of the City and its related agencies with respect to mandatory maternity leave regulations (App. at 39a-42a).

In particular, the Complaint alleges that the UFT and the UFT Welfare Fund violated the proscription against discrimination on the basis of sex contained in Title VII in that:

"Defendants. . .have. . .discriminated against plaintiffs and the class because of sex, in that they have negotiated and approved health and hospitalization insurance fringe benefits which are discriminatory thereby causing plaintiffs and the class they represent damages..." [App. at 35a].

"Defendants. . .have discriminated against plaintiffs. . .and other class numbers because of sex, in that the defendants have established and administered the defendant UFT Welfare Fund which offers no temporary disability benefits for disability resulting from pregnancy and pregnancy-related conditions, while temporary disability payments are provided for disability resulting from other medical and surgical conditions. [App. at 36a].

The Answer [App. at 96a] submitted on behalf of the UFT and the UFT Welfare Fund denied the previously described allegations of the complaint.

On June 26, 1974, District Court Judge Knapp afforded the parties the opportunity to file briefs as to whether, in light of the Supreme Court decision in Geduldig v. Aiello, 417 U.S. 484, 94 S. Ct. 2485 (1974), the Complaint should be dismissed by the Court, *sua sponte* (App. at 232a). On July 30,

1974, by opinion and order, the Hon. Whitman Knapp dismissed the Complaint with leave to replead and certified to this Court pursuant to 28 U.S.C. 1292(b) "the question whether Aiello has established . . . that disparity between the treatment of pregnancy related and other disabilities does not of itself constitute discrimination on the basis of sex (or gender) within the prohibition of either Title VII or of the Fourteenth Amendment" (App at 302a). Upon the Appellants election not to replead facts alleging invidious discrimination, the complaint was dismissed in its entirety with prejudice. (App. at 313a-314a).

Thereupon, the appellants filed a timely appeal with the Court from Judge Knapp's decision.

By means of a notice of motion dated March 27, 1975, the appellants moved this Court to vacate summarily the previously described Order of the Hon. Whitman Knapp and to remand this action to the United States District Court for the Southern District of New York for further proceedings not inconsistent with this Court's decision in Communications Workers of America v. American Telephone & Telegraph Co., Docket #74-2191.

On April 14, 1975, this Court granted the appellants' motion to vacate Judge Knapp's

decision and the action was remanded to the District Court.

Thereupon, the UFT and the UFT Welfare Fund, as well as the SSEU and the SSEU Welfare Funds, timely filed petitions for a writ of certiorari with the United States Supreme Court.

On January 10, 1977, the United States Supreme Court entered an order granting the aforementioned petitions for certiorari and further remanding the cases to this Court "...for further consideration in light of General Electric Co. v. Gilbert, ___ U.S. ___ (1976)."

ARGUMENT

POINT I

THE DECISION OF UNITED STATES DISTRICT
COURT JUDGE WHITMAN KNAPP WAS CORRECT

In his decision of July 30, 1974, Judge Knapp dismissed the appellants' complaint with leave to amend, which course of action the appellants declined to follow.

Upon consideration of the appellants' contention that the defendants, UFT and UFT Welfare Fund, (among other defendants), have discriminated against certain appellants, in the treatment of pregnant employees, (see paragraphs 60-63, App. at 34a-37a), Judge Knapp, relying upon footnote 20 of the Supreme Court's decision in Geduldig v. Aiello, 417 U.S. 484, held as follows:

"[Footnote 20] flatly states that distinctions involving pregnancy do not constitute discrimination because of sex (or gender)."

Judge Knapp thereupon referred to and relied upon footnote 20 of the Geduldig decision, supra, which provides as follows:

"...this case is thus a far cry from cases like Reed v. Reed, 404 U.S. 71, and Frontiero v. Richardson, 411 U.S. 677, involving discrimination based upon gender as such. The California

insurance program does not exclude anyone from benefit eligibility because of gender, but merely removes one physical condition - pregnancy - from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in Reed, supra, and Frontiero, supra.

Normal pregnancy is an objectively identifiable physical condition with unique characteristics. *Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.*

The lack of identity between the excluded disability and gender as such under this insurance program become clear upon the most cursory analysis. The program divides potential recipients into two groups - pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes."

In his decision, Judge Knapp cogently put to rest the appellants' contentions in the following manner:

"The threshold question is whether disparity of treatment between pregnancy related disabilities and other disabilities can be classified as discrimination because of sex (or gender). If as footnote 20 seems to suggest, it cannot be so classified, then the further question of whether such disparity is justified - or less justifiable in the employment context than in some other context - can never be reached.

In other words, if the *Aiello* Court had found that the California scheme did discriminate on the grounds of sex (or gender) but must nevertheless be upheld because of the deference due to California's sovereign right to make choices in methods of providing social welfare, the holding would clearly be inapplicable to a case arising under Title VII where no such deference is required. But such, as we read it, was not the holding of the Court. The holding was that California's treatment of pregnancy related disabilities did not in and of itself constitute a discrimination based on sex (or gender). Such a holding precludes relief under Title VII even more clearly than under the Fourteenth Amendment. Under the Amendment, it would be open to pregnant women to argue that it was irrational to single them out as a class even if the singling out were not sex related. No such argument is open under Title VII, which deals only with discrimination 'because of sex.'⁴² U.S.C. Sec. 2000e(2)(a)(1).

In *Geduldig v. Aiello*, *supra*, it is relevant to recall that the Supreme Court squarely held that the exclusion of pregnancy and pregnancy related conditions from a state administered insurance program in and of itself does not constitute discrimination on the basis of sex. Having reviewed the California disability benefit plan with respect to its inclusion and exclusions of disability risk, the Supreme Court concluded that the state disability plan did not discriminate against any definable group or class, and observed,

"[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.^{1/}

In its most recent brief of April 18, 1977, the Appellants not only seek to challenge the Supreme Court's rationale as stated in *General Electric Co. v. Gilbert*, 429 U.S. ___, 97 S. Ct. 401 (Appellants' brief page 20), but contend that the defendants denial of disability benefits resulting from pregnancy and related conditions "has a disproportional impact on women", (Appellants' brief pages 8 - 11), and further contend that defendants' justification for the exclusion of such benefits is pretextural. (Appellants' brief page 22).

Significantly, the instant complaint is not only devoid of any allegation to the effect that the denial of disability benefits resulting from pregnancy has a disproportional impact on women, but further fails to allege that any of the defendants' possible justifications for denying such benefits are pretextural.

1/ 417 U.S. 484, 94 S.Ct. at 2492.

As the plaintiffs chose not to heed Judge Knapp's admonition to amend their complaint, they are now precluded from doing so.^{2/}

Based upon the Supreme Court's decision in General Electric Co. v. Gilbert, supra, it would appear that Judge Knapp's dismissal of the complaint and his reliance upon Geduldig v. Aiello. supra, were well founded.

2/ Traditionally, FRCP 8(a) has been interpreted to merely require that a plaintiff's pleadings set forth a short, plain statement of the claim so as to provide the defendants fair notice of what the plaintiff's claim is and the ground upon which it rests. However, in the context of Title VII proceedings, mere notice pleading has been held to be insufficient. In Valley v. Maule, 297 F.Supp. 958 (D. Conn 1968), the Court citing Powell v. Workmen's Compensation Bd. of State of New York, 327 F2d 131, 137 (2d Cir. 1964) and Birnbaum v. Trussell, 347 F 2d 86, 89 (2d Cir. 1965) held:

"As a general rule, notice pleading is sufficient, but an exception has been created for cases brought under the Civil Rights Act. The reason for this exception is clear. In recent years, there has been an increasingly large volume of cases brought under the Civil Rights Act. A substantial number of these cases are frivolous or should be litigated in the State Courts, they all cause defendants... - considerable expense, vexation and perhaps unfounded notority."

In Valley v. Maule, supra, the Court dismissed the pending complaints on the theory said complaints were utterly devoid of any factual allegations overt acts, or a purposeful deprivation of rights.

In its decision in General Electric Co., supra, the Supreme Court first pointed out that the Court of Appeals "was wrong in concluding that the reasoning of Geduldig was not applicable to an action under Title VII." More particularly, the Court held that Geduldig, supra, was "...precisely in point in its holding that an exclusion of pregnancy from a disability benefit plan providing general coverage is not a gender-based discrimination at all."

Significantly, the plaintiffs herein do not allege that the benefit package offered by the UFT Welfare Fund is worth more to men than to women.

As the Supreme Court stated in General Electric Co., supra, and so too in the instant matter, it is impossible to find any gender-based discriminatory effect in the plan of benefits offered by the UFT Welfare Fund "...simply because women disabled as a result of pregnancy do not receive benefits." As the Court went on to point out, "gender-based discrimination does not result simply because an employer's disability plan is less than all-inclusive."

Taking into account the Supreme Court's holdings in both Geduldig, supra, and General Electric Co., supra, to the effect that the exclusion of pregnancy from a disability benefits plan does not constitute a violation of Title VII, and given the fact that the appellants' complaint fails to allege that the denial of disability benefits relating from pregnancy (1) has a disproportional impact on women, or (2) constitutes a pretext designed to effect an invidious discrimination against members of one sex or the other, Judge Knapp's dismissal of the instant complaint must be affirmed. Madrid v. Board of Education of Gilroy School District, 14 FEP 1073 (U.S.D.C. Northern District of California, March 24, 1977).

POINT II

THE PLAINTIFF WICGU HAS NO CAPACITY TO SUE; IS NOT A PROTECTED PERSON UNDER TITLE VII; AND NOT BEING A PROTECTED PERSON MAY NOT BE REPRESENTATIVE OF A CLASS OF LITIGANTS OF WHICH IT IS NOT A MEMBER.

Point III A.4. of the Appellants'

Complaint alleges that WICGU is nothing more than "an unincorporated employee organization composed of females employed by the City" (App. at 7a).

However, there is no allegation to the effect that WICGU represents any individuals within a class of persons who are employed by the City and were capable of becoming pregnant or did become pregnant. Thus, WICGU is ineligible to represent the alleged class. National Welfare Rights

Organization v. Wyman, 304 F. Supp. 1346 (E.D.N.Y. 1969). Moreover, there is no contention that any of WICGU's members suffered any loss, injury, damage or discrimination at the hands of defendants UFT or UFT Welfare Fund. Wilson v. Kelley 294 F. Supp. 1005 (N.D. Ga. 1968), aff'd 393 U.S. 266 (1968). Thus, WICGU does not have the requisite standing to bring this action under 42 U.S.C. 2000e-(f)(1), in its own right, as it is not an aggrieved person within the meaning of the Civil Rights Act. Thomas v. Clarke, 54 F.R.D. 245

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(D.C. Minn., 1971); Price v. Skolnick, 54 F.R.D. 261 (D.C.N.Y., 1971); Kaufman v. Dreyfus Fund, Inc., 434 F2d 727 (3rd Cir. 1970).

POINT III

THE COURT HAS NO JURISDICTION OVER THE SUBJECT MATTER OF THIS ACTION UNDER TITLE VII WITH RESPECT TO PLAINTIFFS ARLENE FRIEDMAN AND ROBERT SUSSMAN SINCE THE JURISDICTIONAL PREREQUISITE OF THE ISSUANCE OF "RIGHT TO SUE" LETTERS PRIOR TO THE INSTITUTION OF THE ACTION HAD NOT BEEN MET.

As a prerequisite to the institution of a Civil action under the Civil Rights Act of 1964, Title 42, Section 2000e-5(f)(1) states in part:

"If a charge filed with the Commission... is dismissed by the Commission, or if... the Commission has not filed a civil action under this section...or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission...shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved..."

Neither plaintiff, Arlene Friedman nor Robert Sussman who have alleged causes of action against the UFT and the UFT Welfare Fund have asserted that either of them received right to sue letters from the EEOC as required above. Further, Sussman does not even allege having filed a charge with the EEOC.

As clearly enumerated in the foregoing cases a "right to sue" notice, issued pursuant to 42 U.S.C. 2000e-(f)(1), is a prerequisite to a Federal District Court acquiring jurisdiction in a Title VII, action, Patterson v. Newspaper Mail Deliveries Union, F. Supp. , 7 F.E.P. Cases 260, (S.D.N.Y., 1974); Love v. Pullman, 404 U.S. 522 (1972); Johnson v. Seaboard Coast Line Railroad, 404 F. 2d 645 (4th Cir., 1968), cert. den. 394 U.S. 918; Stebbins v. Continental Insurance Co., 442 F. 2d 843 (D.C. Cir., 1971); McDonald v. General Mills, Inc., , F. Supp. , 7 F.E.P. Cases 66 (E.D. Cal., 1974); Gilbert v. General Electric Co., 59 F.R.D. 267 (E.D. Vir., 1973).

Similarly, the failure to file a charge with the EEOC will also defeat the jurisdiction of this Court in a Title VII action. Richardson v. Miller, 446 F. 2d 1247 (3rd Cir., 1973); Griffin v. Pacific Maritime Ass'n. 478 F. 2d 1118 (9th Cir., 1973); Jerome v. Viviano Food Co., F. Supp. , 7 F.E.P. Cases 143 (E.D. Mich. 1973) aff'd. 489 F. 2d 965; Perrino v. Southern Bell T&T Co., F. Supp. , 3 F.E.P. Cases 307 (S.D. Fla., 1970), aff'd. 440 F. 2d 791.

Further, the Complaint gives no indication that those plaintiffs who did file charges with the EEOC named either the UFT or the UFT Welfare Fund in such charges. It is clearly a jurisdictional prerequisite to a suit under Title VII that a charge be filed against the party to be sued.

Bowe v. Colgate-Palmolive Co., 416 F. 2d 711, (7th Cir., 1969); Richardson v. Miller, 446 F. 2d 1247 (3rd Cir., 1971); Beverly v. Lone Star Lead Constr. Corp., 437 F. 2d 1136 (5th Cir., 1971); Tuma v. American Can Co., F. Supp. 6 F.E.P. Cases 573, (D.C.N.J., 1973); Edmonson v. Wackenhut Corp., F. Supp. , 2 F.E.P. Cases 39 (M.D. Fla., 1968).

It is respectfully submitted that this Court lacks subject matter jurisdiction over the claims asserted under Title VII of the Civil Rights Act of 1964 as against the UFT and the UFT Welfare Fund. Clearly, Title VII has not been complied with by those Plaintiffs asserting Title VII claims against the defendants, UFT and the UFT Welfare Fund.

Significantly, neither plaintiffs WICGU, Cantelmi, Friedman nor Sussman pleaded that they had ever demanded temporary disability payments from the UFT Welfare Fund.

The recent case of McDonnell Douglas

Corp. v. Green, 411 U.S. 792 (1973) is instructive with respect to the necessity of such a demand.

In McDonnell Douglas, a case involving a claim of racial discrimination under Title VII of the Civil Rights Act of 1964, the Court held that:

"The complainant in a Title VII trial must carry the initial burden under the Statute of establishing a prima facie case of racial discrimination. This may be done by showing...that he applied and was qualified for a job for which the employer was seeking applicants....that, despite his qualifications, he was rejected..."
(5 F.E.P. cases 970).

If the facts of demand and refusal are necessary elements of a Title VII discrimination case, they are necessary allegations of a Title VII complaint. See McDonald v. General Mills, Inc., F. Supp., 7 F.E.P. Cases 66, 70 (E.D. Cal., 1974), where the Court stated:

I nonetheless feel constrained to point out that a recently decided Supreme Court case, cited by none of the parties, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed., 2d 668, 93 S.Ct. 1817, 5 FEP Cases 965 (1973), cast considerable doubt on the viability of plaintiff's claim as presently set forth in her complaint. In that case, involving alleged racially discriminatory employment practices, Justice Powell enunciated the elements of a prima facie case in a Title VII action as follows: 'The complainant in a

Title VII trial must carry the initial burden under the statute (Civil Rights Act of 1964) of establishing a *prima facie* case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that *he applied* and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.¹ 36 L. Ed. 2d at 677, 5 FEP Cases at 969 (emphasis added). In the case at bar, plaintiff has *not alleged* in her complaint (1) that she ever applied or asked to be interviewed at the college placement office by the defendants, (2) that she ever applied for employment with the defendants, or (3) that any of the defendants has refused to hire her because of her sex, or for any other reason. She *alleges only* that she sought to use the services of the Sacramento State College Graduate Placement Center and was 'detected from making application for employment and seeking an interview' with representatives of the defendants. Without deciding, it appears that plaintiff has not established a *prima facie* case, in that she has *failed to allege* that she actually applied for either an interview or a job with any of the defendants. In the event plaintiff is able to overcome the jurisdictional defects in this case and decides to file a new action, the standards enunciated in *McDonnell Douglas Corp. v. Green* should be given careful consideration.

IT IS ORDERED that this action be, and the same is hereby, dismissed for lack of subject matter jurisdiction." (Emphasis supplied.) (8F.E.P. cases 66 70).

The reasoning of the McDonald case,
supra, is commended to this Court and the Court
is respectfully urged to hold that the instant
Complaint is defective with respect to the UFT
and the UFT Welfare Fund for want of necessary
allegations.

POINT IV

A WELFARE FUND WHICH IS NOT AN EMPLOYER, LABOR ORGANIZATION OR EMPLOYMENT AGENCY IS NOT SUBJECT TO TITLE VII AND IS THEREFORE NOT A PROPER PARTY DEFENDANT IN AN ACTION THEREUNDER.

42 U.S.C. Section 2000e-5(f)(1), provides, in part, that:

"If a charge filed pursuant to subsection (b) of this section is dismissed by the Commission, or if... the Commission has not filed a civil action under this section...the Commission...shall so notify the person aggrieved and...a civil action may be brought against the respondent named in the charge..."

Subsection (b), 42 U.S.C. 2000e-5(b), indicates that a charge is the instrument alleging an unlawful employment practice against an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs. It is quite clear that this foregoing list of entities, constitutes the exclusive list of organizations subject to Title VII of the Civil Rights Act of 1964. This is consistent with 42 U.S.C. 2000e-2 and 2000e-3 which sets forth the scope of unlawful employment practices, and only the foregoing list of entities is mentioned.

The UFT Welfare Fund is not in fact an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training, i.e. not one of the entities explicitly listed in the Act. Significantly, the appellants have not alleged the UFT Welfare Fund to be a covered entity within the meaning of Subsection (b) of 42 U.S.C. 2000e-5 (App. at 21a).

POINT V

THE COMPLAINT IS FATALLY DEFECTIVE
BECAUSE OF NON-COMPLIANCE WITH
FRCP 8(a).

The complaint is fatally defective
because of non-compliance with FRCP 8(a) in that:

- (a) WICGU failed to allege that it had a cause of action under Title VII in its own rights; failed to name its members as representative parties required by FRCP Rule 23.2;
- (b) Plaintiffs in action against UFT and UFT Welfare Fund failed to allege issuance of "right to sue" letters prior to institution of said action;
- (c) Plaintiffs failed to plead facts supporting jurisdictional prerequisites necessary in class actions of (1) numerosity, (2) commonality, (3) representivity and (4) typicality;
- (d) Plaintiffs failed to plead in actions against UFT and UFT Welfare Fund that they had filed charges against said defendants with EEOC naming them as such; nor exhaustion of their remedies under Title VII;
- (e) Plaintiffs in action against UFT and UFT Welfare Fund failed to plead that demand had been made for payment of disability benefits prior to institution of action;
- (f) Plaintiffs failed to make a timely motion under Rule 11A(c) of the Rules of the District Court for determination under FRCP Rule 23(c)(1) for a class determination, a defect precluding the maintenance of the action and prosecuting this appeal.

In Point II of this brief, it was contended as a matter of substantive law that WICGU and the individual plaintiffs alleging causes of action against the UFT and UFT Welfare Fund lacked capacity to sue; had no causes of action and were improper parties to maintain a class action.

In Point III, the matter of substantive law pertaining to the jurisdictional prerequisite of the issuance of "right to sue" letters prior to the institution of the action and the necessity of demand and refusal were established.

In Point IV, the matter of substantive law pertaining to a Welfare Fund *not* being subject to Title VII was reviewed.

With respect to these issues of substantive law:

A. WICGU was required to and failed to plead:

(1) the grounds upon which the Court's jurisdiction depends (FRCP Rule 8(a)(1); (Local Rule 11A)

(2) facts that the WICGU was entitled to relief in its own rights and the issuance of right to sue letters (FRCP Rule 8(a)(2);

(3) that the class against the UFT and UFT Welfare Fund was proper because of (i) numerosity, (ii) common question of law or fact, (iii) claims are typical and (iv) the representative parties will fairly and adequately protect the class (FRCP Rule 23(a); Local Rule 11 A(2);

(4) as an alleged unincorporated association the name(s) of certain of its members as representative parties (FRCP Rule 23.2) (Local Rule 11A (2)(i) (ii) (iii) (iv) and (v);

B. WICGU was required to and failed within sixty (60) days after filing the complaint to move for a class determination (FRCP Rule 23(c); (Local Rule 11A(c)).

C. The remainder of the plaintiffs alleging causes of action against the UFT and the UFT Welfare Fund namely, Friedman, Sussman and Cantelmi, were required to and failed to plead;

(1) the grounds upon which the Court's jurisdiction depends FRCP Rule 8(a)(1); (Local Rule 11 A);

(2) facts that

(a) they had filed charges with the EEOC against the UFT and UFT Welfare Fund FRCP Rule 8(a)(1)(2);

(b) the exhaustion of their remedies under FRCP Rule 8(a)(2).

(c) that right to sue letters were issued to them prior to the institution of the action, FRCP Rule 8(a)(1)(2);

(d) demand for payment prior to institution of the action and refusal, FRCP Rule 8(a)(1)(2).

(3) that the alleged class of plaintiffs against the UFT and UFT Welfare Fund was proper because of (i) numerosity, (ii) common questions of law or fact, (iii) claims are typical and (iv) the representative parties will fairly and adequately protect the Class FRCP Rule 23(a); Local Rule 11A (2);

D. The said individual plaintiffs were required to and failed within sixty (60) days after filing the complaint to move for a class determination (FRCP Rule 23(c)); Local Rule 11A(c).

Females who may have been capable of becoming pregnant, but who did not become pregnant, can show no disability of any kind. The portion of the alleged class can show no injury, damage or discrimination. A showing of injury and harm is necessary, Wilson v. Kelley, 294 F. Supp. 1005, affd. 393 U.S. 266. In this connection, the Court should also consider the practical impossibility of determining who is or was capable of becoming pregnant. Moreover, the failure to plead, demand and refusal, in this case, is an unforgiveable defect. McDonnell Douglas Corp. v. Green, supra; McDonald v. General Mills, Inc., supra.

The provisions of Local Civil Rule 11 A are clear. Rule 11A(c) requires the plaintiffs to have moved this Court for a class determination within sixty (60) days after the filing of the pleading asserting a claim for a class, in this case, the Complaint. The Complaint herein was filed on January 17, 1974. The sixty day period expired on March 18, 1974.

"The public business of the court... has been hampered and delayed. The purpose of Rule 11A(c) and (d) is to prevent the parties in a class action from impeding the course and progress of the litigation by failing to move for a class action determination."

Walker v. Columbia University, F. Supp. 7 F.E.P. Cases 100,101 (S.D.N.Y., 1/21/74).

It is submitted that in order for a Court to authorize a class action, the Court must be strongly convinced that the named plaintiffs will fairly and adequately represent the interests of the alleged class, as inadequate representation would seem to violate the "due process" rights of absent class members. Hansberry v. Lee, 311 U.S. 32 (1940); Mersey v. First Republic Corp. of America, 43 F.R.D. 465 (S.D.N.Y., 1968); Feliciano v. Romney, 363 F. Supp. 656 (S.D.N.Y., 1973).

The plaintiffs asserting claims against the UFT and the UFT Welfare Fund have committed such fatal procedural defects and engaged in omissions which have demonstrated their inability to fairly and adequately protect and represent absent class members.

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CONCLUSION

For all of the foregoing reasons,
the UFT and UFT Welfare Fund respectfully submit
that the order of the District Court dated
October 10, 1974 dismissing the Complaint with
prejudice be affirmed in its entirety.

Respectfully submitted,

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May 12, 1977

ADDENDUM

CONSTITUTIONAL PROVISIONS,
STATUTES, RULES AND REGULATIONS INVOLVED

The FOURTEENTH AMENDMENT to the United States Constitution provides in relevant part:

"Section 1: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title VII of the Civil Rights Act of 1964 as amended, 42 USC §2000(e)2, *et seq.*, provides in relevant part:

(a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color,

religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex or national origin.

(c) It shall be an unlawful employment practice for a labor organization -

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Title VII of the Civil Rights Act of 1964

as amended, 42 U.S.C. §2000e-3, provides:

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

(b) It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any person established to provide apprenticeship or other training by such a joint labor-management committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §2000e-5(b) provides:

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during

and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than \$1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

Title VII of the Civil Rights Act of 1964

as amended, 42 U.S.C. §2000e-5(f)(1) provides:

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge

filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice, a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

Rule 8(a) of the Federal Rules of Civil Procedure provides:

Rule 8. General Rules of Pleading

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

Rule 23 of the Federal Rules of Civil Procedure provides:

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Action Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Order in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Rule 23.2 of the Federal Rules of Civil Procedure provides:

Rule 23.2. Actions Relating to Unincorporated Associations
An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action, the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e).

Rule 11 A of the Rules of the United States District Court for the Southern District of New York provides:

Rule 11A. Class Actions

In any action sought to be maintained as a class action:

(a) The Complaint shall bear next to its caption the designation "Complaint - Class Action." Comparable designations shall appear on any other pleading (counterclaim or cross claim) asserting a claim for or against a class.

(b) The Complaint (or other pleading asserting a claim for or against a class) shall contain next after the jurisdictional grounds and under the separate heading "Class Action Allegations";

(1) A reference to the specific part or parts of Rule 23(b), Fed. R. Civ. P., under which it is claimed that the action is properly maintainable as a class action.

(2) Appropriate averments to justify such claim - including, but not necessarily limited to,

(i) the number (or approximate number) of members of the class,

(ii) a description of the members of the class,

(iii) the basis upon which it is claimed that the party asserting the claim will fairly and adequately protect the interests of the class, or, if the claim is asserted against a class, that the named members of the class will fairly and adequately protect the interests of that class,

(iv) the question of law or fact claimed to be common to the class, and
(v) in actions claimed to be maintainable as class actions under subdivision (b)(3) of Fed. R.Civ. P. 23, averments to support the findings required by that subdivision, including those noted under (A), (B), (C) and (D) of the subdivision.

(c) Within sixty (60) days after the filing of a pleading asserting a claim for or against a class, the party asserting that claim shall move for a determination under Fed.R.Civ. P. 23(c)(1) as to whether the action is to be maintained as a class action and, if so, the membership of the class. In ruling upon such a motion, the court may allow the action to be so maintained, may disallow and strike the class action averments, or may order postponement of the determination pending discovery or such other preliminary procedures as appear to be appropriate and necessary in the circumstances. Whenever possible, where the determination is ordered to be postponed, a date will be fixed in the order for renewal of the motion before the same judge.

(d) If the party asserting the claim for or against a class fails to make a timely motion under subsection (c) of this rule, the opposing party shall move, within thirty (30) days after expiration of the time allowed for such motion to dismiss the action as a class action. In ruling upon such a motion, the court may grant or deny it in the exercise of its informed discretion; may deny it, but award costs, expenses and counsel fees against the party seeking the maintenance of the claim as a class action or his counsel; or may grant such other relief as may be appropriate in all the circumstances.

COURT OF APPEALS
SECOND CIRCUIT

UFT

WOMEN IN CITY GOVERNMENT etc.

Index No.

Plaintiffs-Appellants

- against -

THE CITY OF NEW YORK; ABRAHAM BEAME as MAYOR
etc.

Affidavit of Personal Service

Defendants-Appellees.

On Remand from the Supreme Court of the United States

STATE OF NEW YORK, COUNTY OF New York

ss.:

I, Reuben A. Shearer, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 211 West 144th Street, New York, New York 10030.

That on the 18th day of May 19 77 at see attached

deponent served the annexed upon

Appellees Brief

see attached

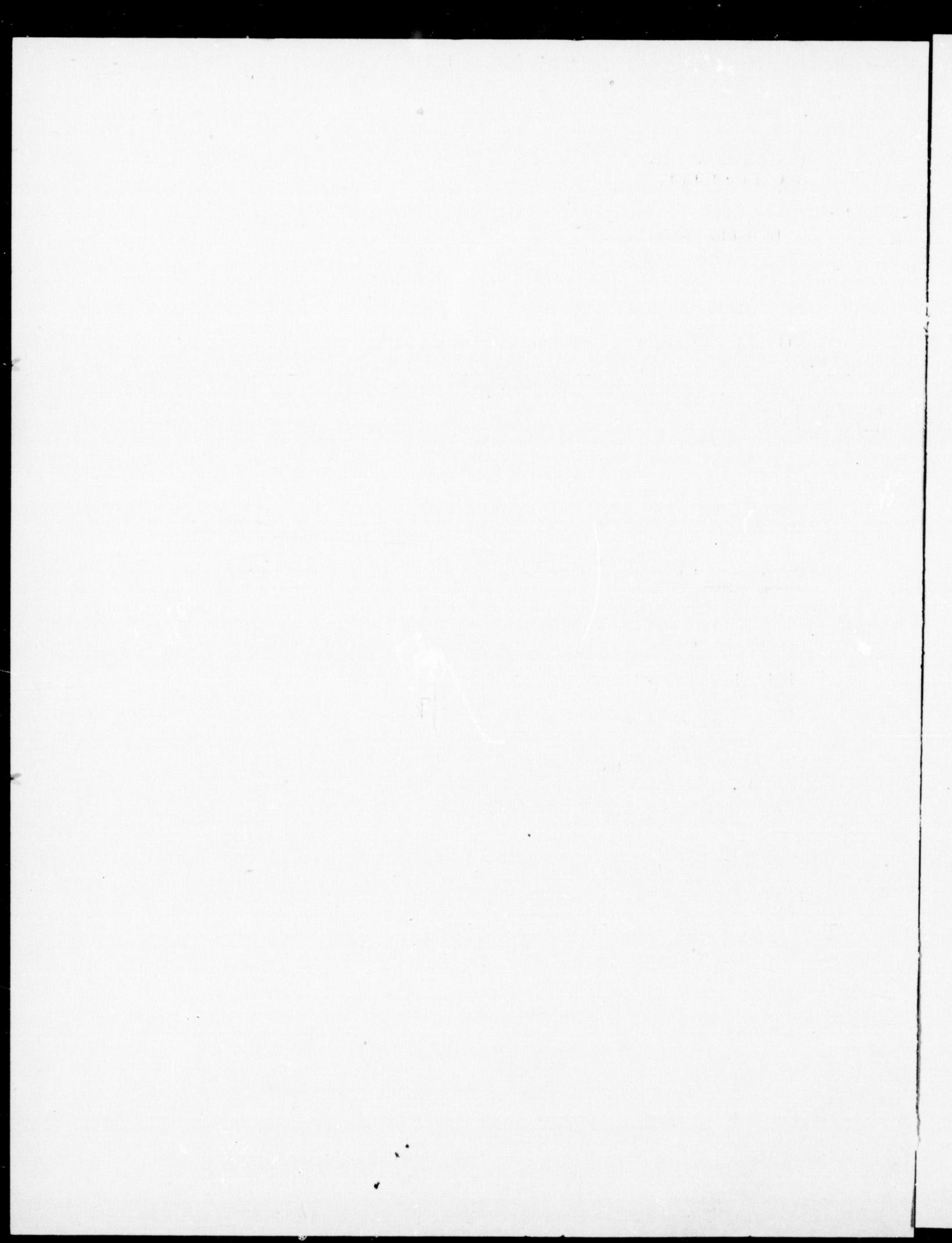
the plaintiffs-appellants in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the attorneys herein,

Sworn to before me, this 18th
day of May, 19 77

Reuben A. Shearer
Reuben A. Shearer

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31 0418950
Qualified in New York County
Commission Expires March 30, 1979



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